**MAGNIFINE SDN BHD**

**v.**

**YAP MUN HIM**

HIGH COURT SABAH & SARAWAK, TAWAU
RICHARD MALANJUM J
[SUIT NO: T (22)-9-1999]
27 MAY 2005

***COMPANY LAW:*** *Directors - Fiduciary duties - Failure to declare commissions received to Board of Directors - Whether defendant obliged to make full and frank disclosure of amount - Whether defendant ran foul of no conflict and no profit rule - Whether defendant owed a duty to act bona fide for company - Whether defendant guilty of making secret profits - Whether defendant must account for such money to plaintiff - Whether defendant unlawfully retained properties of plaintiff - Claim for return of shares allotted to defendant - Whether gift unconditional - Whether plaintiff entitled for return - Whether there was agreement restraining defendant from setting up rival business*

***CIVIL PROCEDURE:*** *Action - Claim for loss and damages - Whether defendant abused position as director to make secret profits - Whether detrimental to plaintiff's interest - Price of raw material marked up - Failure of defendant to secure best available prices in purchases of material - Whether plaintiff suffered losses - Whether defendant negligently failed to exhaust AP quota - Whether defendant unlawfully retained properties of plaintiff - Claim for return of shares allotted to defendant - Whether gift conditional - Whether there was agreement restraining defendant from setting up rival business*

The defendant herein was a shareholder/director of the plaintiff, a company making polypropylene woven bags ('the product'). The facts were that the defendant was responsible for purchasing the main ingredient in the making of the product, polypropylene resins ('pp resins') either directly from Singapore using the AP license issued by the government or from a local supplier through its Sabah agent, Ancom Bhd ('Ancom'). On 8 October 1996, the defendant failed to be re-elected as director during an annual general meeting. Subsequently, the defendant set up another company dealing in the same business. The plaintiff sought this action against the defendant and its complaints were (1) that the defendant had abused his position and office in

order to make secret profits for himself to the detriment of the plaintiff's interest; (2) that due to defendant's act in marking up the price of raw material in breach of his duty, the plaintiff had suffered losses ; (3) the defendant had failed to secure best available prices in the purchases of pp resins and that he had intentionally/negligently failed to exhaust the AP quota which would have saved considerable costs for the resins; (4) that defendant had unlawfully retained the properties of the plaintiff after his failure to be re-elected as director; (5) that defendant should return the shares allotted to him and (6) that the defendant had set up a rival business causing losses to the plaintiff.

**Held (allowing claim only in respect of some reliefs):**

**[1]** From evidence adduced, the defendant had completely failed to declare to the Board of Directors of the plaintiff that he was being paid commissions by Ancom in relation to the purchases of pp resins. The defendant, as director of the plaintiff, was obliged to make a full and frank disclosure of not only the fact that he was being paid but also as to the amount. Indeed even with a full and frank disclosure the no-conflict rule and no-profit rule would not have excused or exempted him from his fiduciary duty to act *bona fide* in the interest of the plaintiff and for proper purposes. The defendant in requesting and accepting payments from Ancom and such other suppliers of the plaintiff ran foul of the no-conflict rule and no-profit rule and indeed made secret profits for himself. The court thus ordered that the defendant account for and remit to the plaintiff the sum of RM428,530. (pp 423 e-g & 424 a-d, f)

**[2]** There was no evidence that due to the marked up of the prices the plaintiff had to endure problems as a result. Indeed the Board of Directors of the plaintiff devised a scheme in order to reduce its taxes by the setting up of a partnership firm called Syarikat Magnifine Cahaya Perniagaan ('Magnifine Cahaya') to do the marketing of the product. Under the scheme the plaintiff sold the product to Magnifine Cahaya at a low price and in turn the plaintiff charged Magnifine Cahaya management fees. The net result was that the plaintiff's financial position continued to appear poor. To attribute such position solely to the marking up of prices of the raw material by the defendant would be unsustainable. (p 426 f-g)

**[3]** The best available prices referred to by the plaintiff were premised on the assumption that it had no financial problems at that time, but the evidence showed otherwise. The idea of getting the best prices especially when the raw material had to be imported from Singapore which required payments to be immediately could not be fully attained by the plaintiff. Without any evidence of actual loss and damage suffered by the plaintiff, the court was unable to consider the claim. Further, it was probably agreed that local purchases should be preferred to that of imported resins for the reasons given by the defendant in his evidence. For the plaintiff now to turn around and say that the defendant should have exhausted the AP quota would be quite unfair to the defendant. (pp 427 d-e & 429 b-g)

**[4]** The defendant was not re-elected as a director and he was no longer in charge of the administration of the plaintiff. There was no reason for him to keep the Trooper and one unit of computer belonging to the plaintiff. Further, the court could not accept the defendant's reason for not returning the said items because the plaintiff had not officially given him a written letter stating that he was dismissed as director. Accordingly, the court made the order for him to return them to the plaintiff. (pp 430 g & 431 a)

**[5]** In respect of the claim for the return of the shares allotted to the defendant, it was not in dispute that those shares belonged to the defendant. There was no other reason advanced by the plaintiff other than saying that the shares were given for free earlier on. However the gift was not conditional. The plaintiff also failed to point out any provision in the Memorandum and Articles of the plaintiff which entitled it to ask for the return of the shares in the event of any breach of duties by the defendant. The plaintiff had not proved on the balance of probabilities that it was entitled for the return of the said shares. (p 431 c-d)

**[6]** There was no kind of agreement restraining the defendant from setting up rival business upon leaving the plaintiff. Indeed there was no fiduciary duty against legitimate competition between directors (including employees) with a company upon resignation. (p 432 b-c)

*[Order accordingly.]*

**Case(s) referred to:**
*Attorney-General Reference (No 2 of 1982) [1984] 2 All ER 216* ***(refd)***
*Balston Ltd v. Headlines Filters Ltd [1990] FSR 385* ***(refd)***
*Belmont Finance Corporation Ltd v. William Furniture [1979] 1 All ER 118* ***(refd)***
*Boston Deep Sea Fishing and Ice Company v. Ansell [1888] 39 Ch 339* ***(refd)***
*Bray v. Ford [1896] AC 44* ***(refd)***
*Fur Ltd v. Tomkies [1936] 54 CLR 583* ***(refd)***
*Mahesan v. Malaysian Government Officers Co-operative Housing Society Ltd [1975] 1 MLJ 77* ***(refd)***
*Neptune (Vehicle Washing Equipment) Ltd v. Fitzerald (No 2) [1995] BCC 1000* ***(refd)***
*Regal (Hastings) Ltd v. Gulliver [1942] 1 All ER 378* ***(refd)***
*Tan Kiong Hwa v. Andrew SH Chang [1974] 2 MLJ 188* ***(refd)***
*Tengku Abdullah Ibni Sultan Abu Bakar & Ors v. Mohd Latiff Shah Mohd & Ors and Other Appeals [1997] 2 CLJ 607 CA* ***(refd)***
*The Board of Trustees of the Sabah Foundation & Ors v. Datuk Syed Kechik Syed Mohamed & Anor [1999] 6 MLJ 497* ***(refd)***
*Yap Sing Hock & Anor v. PP [1992] 4 CLJ 1950; [1992] 1 CLJ (Rep) 356 SC* ***(refd)***

**Legislation referred to:**
Civil Law Act 1956, s. 11
Contracts Act 1950, s. 28

*For the plaintiff - Colin Clark (Ting Sing Chuan with him); M/s Ting & Co*
*For the defendant - Shanty Chong (Chin Yuen Fong with her); M/s Chee & Co*

*Reported by Suhainah Wahiduddin*

## JUDGMENT

**Richard Malanjum J:**

### Introduction

On 20 May 2005 judgment was rendered for this action. I now give the reasons for my decision.

In this action the plaintiff prays for the following orders, namely:

i) damages for failing to procure purchases of Polypropylene resin at reasonable market prices at best available market price and/or fair and/or reasonable prices or prices at arm-length as well as damages in the form of loss of benefits which could have been received if the Defendant had exhausted the Duty-free scheme.

ii) Alternatively, a declaration that the Plaintiff is entitled to recover from the Defendant such sums which the Defendant may receive by way of secret profits or commissions in causing purchases at excessive prices and that the Defendant had become indebted to the Plaintiff in respect of each sum as and when he received the same;

(iiA) A declaration that the Defendant is disentitled to continue to be in a shareholder of the Plaintiff;

(iiB) The Defendant's shareholding in the Plaintiff be revoked cancelled and forfeited;

(iiC) Damages for instigating, or causing the Plaintiffs said workers to resign and work for Amble Brilliance Sdn. Bhd.;

(iiD) Damages and/or loss of profit for breach of his duties as manager officer-in-charge director, sales and purchases manager in setting up an identical business as the Plaintiff in close proximity of the Plaintiff's business in Tawau using the confidential secret and special knowledge acquired in such positions;

(iiE) The Plaintiff claim for an account as at 31/12/1996 of all purchase of PP resin concluded by the Defendant on behalf of the Plaintiff, of the proceed of those payments effected by the Defendant on behalf of the Plaintiff;

(iiF) An order for payment by the Defendant to the Plaintiff for all sums found to be due from the Defendant to the Plaintiff on the taking of the account under (iiE);

(iiG) Damages or further or other relief including all further necessary appropriate accounts inquires and directories.

iii) Damages and losses in consequence of the loss of the goods and documents retained by the Defendants.

iv) Indemnity from the Defendant for taking the files and documents and retaining them.

v) Interest at such rate and for such rate and for such period as the Court shall deem fit.

vi) Further or other relief as the Court shall deem fit and recoverable.

However in his submission learned counsel for the plaintiff acknowledged that the evidence adduced concentrated on the prayers pertaining to:

i) the secret Commission or personal profit taken by the Defendant. Since the secret commission was taken secretly (ie, without the knowledge nor consent of the Plaintiff) and during this period, the Defendant was the officer-in-charge and the Director-cum-Managing Director, the Plaintiff in addition pleads for an account thereof.

ii) damages for failing to procure purchases of PP resins at reasonable market prices at best available market price and/or fair and/or reasonable price or prices at arms-length.

iii) damages in the form of loss of benefits for failure to exhaust the AP quota.

iv) damages resulting from the Defendant keeping the Plaintiff's Company's Trooper and Computer, without the knowledge nor consent of the Plaintiff.

The defendant in his defence denies any liability and prays that this action be dismissed with costs.

From the amended statement of claim it is apparent that the main complaint of the plaintiff is that the defendant while as the so-called 'managing director' of the plaintiff had abused his position and office in order to make secret profits for himself to the detriment of the interests of the plaintiff. The other grouses are, *inter alia*, that the defendant had unlawfully retained the properties of the plaintiff and had used information and knowledge acquired whilst in the employment of the plaintiff to set up a rival business against the plaintiff. I have described the defendant as the so-called 'managing director' on the basis of the assertion by Pang Teck Siong ('PW5') that there was no formal appointment made and that it was the defendant who appointed himself as such. Anyway it was not in dispute that the defendant was in fact managing the plaintiff at the material time. He was also a director of the plaintiff.

**Undisputed And Admitted Facts**

After a lengthy trial with several adjournments at the behest of the parties, in particular the plaintiff, and with several police reports lodged by both sides against each other, the following facts as distilled from the testimonies and documents produced appear to be undisputed, to wit:

a. that the plaintiff was incorporated on or about 26 November 1990 and commenced business in or around September 1991;

b. that it was PW5 and the defendant who came up with the idea of starting a business of making Polypropylene Woven bags ('the product');

c. that the founder directors/shareholders of the plaintiff were Pang Siew Kong, Pang Teck Siong, Chong Suk Hien @ Chong Suk Hiew and the defendant who were each allotted with one share upon its incorporation. The first three are family members whilst the defendant is married to the daughter of the sister of Chong Suk Hien;

d. that it was PW5 who invited his family members to financially assist in the venture;

e. that the main shareholders of the plaintiff are family members of PW5. Their names and shareholdings credited as fully paid as at 14 June 1991 were as follows:

i. Pang Siew Kong ('PSK'), the father of PW5 – 49,999 shares;

ii. Chong Suk Hien (wife of PSK) – 49,999 shares;

iii. Pang Siew Yin (the brother of PSK) – 100,000 shares;

iv. Pang Teck Siong (the son of PSK) – 24,999 shares; and

v. the defendant – 24,999 shares;

f. that it was agreed between the defendant and PW5 that the former would take care of the administrative and accounts sections of the business while the latter would oversee the operation/factory aspect. There was no document to indicate such arrangement. Neither was there any document appointing the defendant as the Managing Director of the plaintiff;

g. that three signatories were necessary for the issuance of cheques of the plaintiff;

h. that at all material times the defendant was a director of the plaintiff until he failed to be reelected during 8 October 1996 annual general meeting of the plaintiff;

i. that the factory was located in a different area away from the administrative office;

j. that the defendant was the main person responsible for the purchase of Polypropylene resins ('pp resins') the main ingredient in the making of the product;

k. that the defendant purchased the pp resins either directly from Singapore using the AP license issued by the Government or from a local supplier, Titan Himont Polymers (M) Sdn Bhd ('Titan') through its Sabah agent, Ancom Bhd ('Ancom'). Purchases were also made through Harrison Trading ('Harrison');

l. that the defendant was replaced in the management of the plaintiff in July 1996;

m. that the defendant had set up another company, Amble Brilliance Sdn Bhd ('Amble Brilliance') which was also in the business of making the product;

n. that the defendant still has in his possession a sum of RM56,000 collected on behalf of the plaintiff in July 1996 and is keeping one unit of Izuzu vehicle and one unit of desk top computer;

o. that the defendant did receive payments described as commissions in the payment vouchers from Ancom in the total sum of RM428,530 which were credited either into the bank accounts of the defendant or his wife, Lim Lee Fun;

p. that when making purchases through Ancom the plaintiff utilised the credit facilities of Pang Siew Kong Development (Sabah) Sdn Bhd, ('PSK Development'), a company owned by PSK and his wife;

q. that PSK Development did mark up the price of the pp resins bought with its credit facilities;

r. that there was no document to record approval or consent from the plaintiff for the defendant to receive the payments from Ancom and there was no written records to indicate how the sums collected from Ancom were utilised; and

s. save for the minute recording that the defendant had been replaced as the Managing Director of the plaintiff by PW5, there was no other written document on the termination of his service.

**The Issues**

The basic issue for determination in this case is whether the plaintiff is entitled to the reliefs it has prayed for. Of course in considering each of the reliefs sought for there are subsidiary issues for consideration. I will deal with each of them where necessary.

*(a) The Receipt Of RM RM428,530*

It was the evidence of PW5 that the defendant was solely responsible in the purchases of pp resins used as raw materials for the production of the product. This witness said that the defendant was in full control of the office of the plaintiff including its accounts department. No other director had any say in the management except to listen to the monthly summary report by the defendant on the performance of the plaintiff. Even the hiring of staff was subject to his veto. He was effectively the Managing Director of the plaintiff although PW5 said that the defendant appointed himself to that position.

On the specific question of whether the defendant was authorised to collect payments in the form of commissions from vendors of the plaintiff, PW5 replied that he was never given any permission or approval to do so. PW5 also said that such fact was not made known to the Board of Directors of the plaintiff during any of the monthly meetings. According to PW5 all that the defendant told the other directors was that the purchases through Harrison and Ancom incurred a slight marked up from the prices of the manufacturer to account for their profit margin. And it was also the assertion of PW5 that at no time did the defendant ever show any of the payment vouchers from Ancom. In short, it was his testimony that the plaintiff and its Board of Directors were kept completely in the dark about the payments received by the defendant.

On the point that the defendant had to make illegal payments on behalf of the plaintiff, PW5 denied any knowledge of such requirement. He even cited an incident where the Preventive Section of the Customs Department came to seize documents from the office of the plaintiff on suspicion of sales tax evasion. But after investigation was carried out nothing improper was found.

The defendant in his evidence initially did not readily admit having received payments for Ancom in connection with the purchases of pp resins on behalf of the plaintiff. This compelled the plaintiff to adduce the relevant documents for instance exh. P33, 34, 35, and 36. However under cross-examination he finally admitted. This is what he said as recorded verbatim:

Q: You agree that the total commissions received by you and Lim Lee Fun from Amcom total RM428,530.

A: As you have shown to me.

Q: Subject to any obvious errors that your lawyer may bring up you agree that this is the amount that you and Lim Lee Fun have received.

A: Yes.

Clark: I wish to tender this schedule of payment heading "KK commission" as Plaintiff's exhibit.

Chin: No objection.

Court: KK commission is admitted and marked as Exh. P45.

Q: Is it a fact that the monies received by Lim Fun in Exh. P45 was received by her on your behalf.

A: Yes.

Q: You want to clarify.

A: Yes, this is bank to my joint account and I used my wife's name. She does not personally receive the money.

Q: This monies in Exh. P45 was paid by Amcom to you or Lim Lee fun for the purchase of PP resin from Amcom.

A: Yes.

As there was no protest or even a meek denial on the receipts of payments from Ancom and which found their way into the bank accounts of either the defendant or his wife, it is therefore quite unnecessary for me to go into details the evidence of PW1 (Gerald Chua Chun Lee) and PW3 (Juvita Kamala Stevenson) on the reasons for making those payments. The only point left for consideration is whether the explanation of the defendant is sufficient to justify for his receipts of those payments.

There is no doubt that the defendant did not produce any document which could indicate that he was duly authorised by the Board of Directors of the plaintiff or that the plaintiff or any of its directors had tacitly allowed him to receive those payments whilst as a director and so-called managing director of the plaintiff. All the defendant could do was to claim that he did inform the directors of the plaintiff and that his tainted scheme was condoned at least impliedly. But such claim flies in the face of the clear evidence of PW5 and the obvious absence of any supporting document. There was not even any record written in an Exercise Book (Ex D4) as was done by the defendant for his own interest in respect of payments which he alleged were illegal withdrawals by the other directors.

And the explanation given by the defendant for receiving those payments from Ancom was to ensure that there was fund to take care of the interests of the plaintiff when dealing with customers and Government officials. He also cited an incident where he had to pay off the Sabah Electricity Board a sum of RM40,000 to settle the complaint of meter tempering at the factory of the plaintiff. These expenses according to the defendant could not be recorded in the books of the plaintiff. At any rate the defendant said that the plaintiff was in financial difficulty at that time to meet such expenses.

The other line of defence the defendant adopted to justify his collection of the payments was to say that the other directors of the plaintiff were also doing the same thing and that schemes were set up in the form of sister companies being incorporated to serve as vehicles to evade payments of taxes. In particular he cited PSK who he alleged was making profit out of the plaintiff through the use of PSK Development in the purchase and resale of pp resins to the plaintiff.

With respect whatever explanation advanced by the defendant would not answer the basic question of who authorised him to receive the payments while he was a director and so-called managing director of the plaintiff. I do not think his explanation had served any useful purpose. It only exposed his lack of knowledge or understanding of what was expected of him as a company director.

Hence, I find that from the evidence adduced the defendant had, while as director and so-called managing director of the plaintiff and thus a fiduciary, completely failed to declare to the Board of Directors of the plaintiff that he was being paid commissions by Ancom in relation to the purchases of pp resins. As a fiduciary the defendant was obliged to make a full and frank disclosure of not only the fact that he was being paid but also as to the amount. Indeed even with a full and frank disclosure the no-conflict rule and no-profit rule would not have excused or exempted him from his fiduciary duty to act *bona fide* in the interest of the plaintiff and for proper purposes. (See: *Neptune (Vehicle Washing Equipment) Ltd v. Fitzerald (No. 2)* [1995] BCC 1000; *Bray v. Ford* [1896] AC 44).

It is also my finding that the defendant was never authorised, expressed or implied, by the Board of Directors of the plaintiff or by any of the directors of the plaintiff to collect any form of payment from Ancom or from any of the other suppliers of the plaintiff. If indeed he was given the permission he would have no problem informing the other directors of the bank accounts into which those payments were credited. In fact the defendant admitted that

he had utilised the money received from Ancom for his own benefit such as to pay for his housing loan installments. It was also not shown to the court that such conduct by the defendant was permissible under the memorandum and articles of the plaintiff. It must be remembered that the no-conflict rule and no-profit rule are indeed very strict against a fiduciary. Even consent or knowledge of any of the directors or shareholders cannot be considered as that of a company-beneficiary especially if it is a victim of fraud or illegal activity to the detriment of its assets. (See: *Yap Sing Hock & Anor v. Public Prosecutor* [1992] 2 MLJ 714; *Belmont Finance Corporation Ltd v. William Furniture* [1979] 1 All ER 118; *Attorney-General Reference (No. 2 of 1982)* [1984] 2 All ER 216).

I also find that the explanation by the defendant that the payments were for the benefit of the plaintiff remained just an assertion without any credible evidence adduced. In any event such noble intention, if there was any, would be irrelevant and would not have exempted him, being a fiduciary, from the rigours of the no-conflict principle. (See *Regal (Hastings) Ltd v. Gulliver* [1942] 1 All ER 378).

It is trite law that directors are fiduciaries and as such they are subject to the no-conflict principle in equity. They are not allowed to put themselves in a position where their duties conflict with their interests. And 'the taking of commissions or bribes or any kind of undisclosed benefits by a director from any party with which a company is dealing with is the most obvious form of conflict between duty and interests or the making of secret profits' – *Corporate Powers Accountability* by Loh Siew Cheang (2nd edn). (See also: *Tan Kiong Hwa v. Andrew SH Chang* [1974] 2 MLJ 188: *Boston Deep Sea Fishing and Ice Company v. Ansell* [1888] 39 Ch 339; *Fur Ltd v. Tomkies* [1936] 54 CLR 583).

I am therefore satisfied on the balance of probabilities that the defendant in requesting and accepting payments from Ancom and such other suppliers of the plaintiff ran foul of the no-conflict rule and no-profit rule and indeed made secret profits for himself.

And it is trite law that 'liability to account arises from the mere fact that profits have been made in breach of fiduciary duties. The question of fraud, good faith and whether the plaintiffs could have made profits are irrelevant, including whether the plaintiffs have been damaged by the breach of fiduciary duties'. (See: *Corporate Powers Accountability* by Loh Siew Cheang (2nd edn); *Regal (Hastings) Ltd (supra).* In our courts the same principle has been

followed. (See: *The Board of Trustees of the Sabah Foundation & Ors v. Datuk Syed Kechik bin Syed Mohamed & Anor* [1999] 6 MLJ 497; *Tengku Abdullah Ibni Sultan Abu Bakar & Ors v. Mohd Latiff bin Shah Mohd & Ors and Other Appeals* [1997] 2 CLJ 607).

Since the defendant clearly admitted in evidence that he did receive the total sum of RM428,530 in the form of commissions payments in relation to the purchases of pp resins for the making of the product by the plaintiff the law therefore clearly demands that the defendant must account for such money to the plaintiff. (See: *Boston Deep Sea Fishing and Ice Company v. Ansell (supra)*; *Mahesan v. Malaysian Government Officers Co-operative Housing Society Ltd* [1975] 1 MLJ 77 FC.

Accordingly for the foregoing reasons I hereby order that the defendant account for and remit to the plaintiff the sum of RM428,530.

The plaintiff next asked for interest on the sum received. Learned counsel for the plaintiff proposed a compound interest at the rate of 12% calculated from 1 August 1996 to the date of full settlement. His reason was that the defendant had amassed wealth at the expense of the plaintiff which thus enabled him to even launch a rival business soon after leaving the employment of the plaintiff.

With respect, I do not think an imposition of any pre-judgment interest, compound or otherwise, on the sums received as commissions by the defendant from the date preferred by the plaintiff can be justified. To do so would be an added penalty against the defendant after having being ordered to account for all the sums received from Ancom due to his breach of his fiduciary duty. It must be considered that there was no dispute that the defendant did manage the plaintiff from its infancy when it had very limited financial ability. In doing so he could have also spent some of his own money in order to make things happen for the plaintiff. And notwithstanding that I find no credible evidence in support it will also be masking the reality of life if I were to say that entertaining customers is alien in the business world. And although PW5 did say that the defendant received some other benefits besides his salary there was no indication whether he was also receiving allowance to entertain clients of the plaintiff. Further, I should also take into account that the other directors of the plaintiff were partly to be blamed for giving the defendant too much powers and failing to check on him regularly. Probably at that time they were quite contented since PSK Development was also charging margin on the use of its credit facilities in the purchases of raw material for the plaintiff. Thus at most I am prepared to allow simple-interest calculated from the date of filing

of this action. At that point in time the defendant should have considered his legal position or by then he would have consulted a lawyer to assess his chance against the claim for secret profit. As such in the exercise of my discretion pursuant to s. 11 of the Civil Law Act 1956 I allow interest at the rate of 4% per annum on the sum of RM428,530 from the filing of this action, that is, 22 February 1999 to the date of judgment. I will deal with the post-judgment interest later.

It was also the submission of learned counsel for the plaintiff that due to the act of the defendant in marking up the price of the raw material in breach of his duty the plaintiff suffered losses. And he prays for damages to be awarded to the plaintiff in the total sum of RM295,200 being the alleged losses due to the purchases through Harrison and the plaintiff itself. Learned counsel said that those purchases through PSK Development did not incur losses to the plaintiff.

Frankly, I am quite puzzled with this submission especially on the admission by the plaintiff through PW5 that purchases through PSK Development incurred no loss despite the fact that the raw material was also bought from the manufacturer through Ancom in the same way as those purchases through Harrison or directly by the plaintiff. In fact looking at the calculation given by learned counsel it is obvious that the damages he wants is the difference between the actual and the marked-up prices. Effectively he is making a second claim on the amount obtained by the defendant as commissions except that it is described as damages. However from the evidence adduced it was not shown how the plaintiff suffered additional loss arising from the marked up prices.

At any rate, I find no evidence that due to the marked up of the prices the plaintiff had to endure problems as a result. Indeed the Board of Directors of the plaintiff devised a scheme in order to reduce its taxes by the setting up of partnership firm called Syarikat Magnifine Cahaya Perniagaan ('Magnifine Cahaya') to do the marketing of the product. Under the scheme the plaintiff sold the product to Magnifine Cahaya at a low price and in turn the plaintiff charged Magnifine Cahaya managemnt fees. The net result was that the plaintiff's financial position continued to appear poor. To attribute such position solely to the marking up of the prices of the raw material by the defendant would be unsustainable.

I am not saying for a moment that no compensation is payable for such a breach of fiduciary duty on the part of the defendant. (See: *The Board of Trustees of the Sabah Foundation & Ors v. Datuk Syed Kechik bin Syed Mohamed & Anor (supra).* But loss and damage must be proved. In the present case I am not satisfied that the plaintiff has done so on the balance of probabilities. Hence I disallow this part of the claim.

*(b) The Purchase Of The PP Resins, The Failure Of Exhaust AP Quota And Failure To Renew AP Quota*

It is the contention of learned counsel for the plaintiff that the defendant failed to secure the best available prices in the purchases of pp resins. It was further submitted that he did not obtain the raw material at arm's length. Hence the plaintiff suffered loss and damage. As to the damages payable learned counsel for the plaintiff urged this court that it should be the difference between the actual and inflated prices. But at the same time learned counsel accepted the admission by PW5 that in respect of the purchases through PSK Development there was no loss suffered notwithstanding that the price differences in those transactions were also paid to the defendant as commissions. Thus the claim under this head was limited only to the purchases from Ancom directly by the plaintiff and *via* Harrison.

I find the foregoing contention overlaps the earlier claim for damages for breach of fiduciary duty by the defendant. Further, I find that the best available prices referred to by the plaintiff were premised on the assumption that it had no financial problems at that time and thus could purchase the raw material at such prices. But the evidence adduced showed otherwise. Thus even if the pp resins were available at a lower cost at that time it did not mean that the plaintiff was in the financial position to purchase at such prices. Anyway, since I have already ordered that all the commissions received by the defendant are to be paid to the plaintiff that should settle for the additional costs incurred by the plaintiff due to the marked up. As such without any evidence of actual loss and damage suffered by the plaintiff as a result of the failure by the defendant to purchase the pp resins at the costs considered by the plaintiff as the best prices available I am unable to consider this claim. At most PW5 said was that the plaintiff would have paid less for the raw material if not for the marked up prices done at the behest of the defendant. But in what way such act made the plaintiff suffered loss and damage and to the quantum of damages payable were left to the imagination of learned counsel for the plaintiff. And having heard his submission, with respect, I am unable to agree. It would tantamount to an unjust enrichment for the plaintiff since it would mean a further reduction in the prices of the raw material. This claim is therefore refused as I am not satisfied that the plaintiff has proved its loss and damage on the balance of probabilities.

The plaintiff further charged the defendant for intentionally or negligently failing to exhaust the AP quota which would have saved considerable costs for the resins. Learned counsel for the plaintiff argued that the prices from Intraco supplier purchased under the AP quota were the best available prices when compared with the prices of Titan. Learned counsel therefore argued that the plaintiff should be awarded damages in the sum of RM220,304.70 being the differences in the two sets of prices. Interest was also claimed at the rate of 8% per annum from 1 August 1996 to date of full settlement.

There was no dispute that when the plaintiff began operation it did have cash flow problem. That was reflected when PW5 had to go working for one year without pay and it had to take a RM100,000 loan from Jalaladi, a company belonging to PSK. And in order to continue the purchases of raw material for the factory the plaintiff also had to utilize the credit facility of PSK Development. PW5 under cross-examination agreed that purchases of the pp resins under PSK Development were also through Harrison as arranged by the defendant. Further PW5 agreed that the Board of Directors of the plaintiff approved for the defendant to purchase pp resins through Harrison. PW5 also disclosed that he never checked the prices of the raw material with the suppliers as he considered the defendant a brother and thus trusted him.

In his evidence the defendant said that due to the tight financial position of the plaintiff at the commencement of business it had to rely on the credit facilities of PSK Development to purchase the pp resins. Request was also made to Harrison to help purchase the raw material and to give the plaintiff 180 days credit. And it was also the testimony of the defendant that initially the raw material was purchased from Singapore. But when it was available locally from a local manufacturer, Titan, he purchased it from there through Ancom. He gave several reasons for doing so. Firstly he said that he had to maintain business with the local supplier in case of problems to get it from Singapore. Secondly it was due to the sales tax. The defendant said that there were discrepancies in the returns on sales tax and hence they would not have tallied with the monthly reports to the Customs Department. The defendant was not very clear on this reason but one could surmise that the plaintiff was not paying the full sales tax on the product sold. Thus if the raw material was wholly imported from Singapore it would be quite easy for the Customs Department to cross-check on the sales tax. But it would not be simple if the purchases were done locally. In other words, any short payments on sales tax would be to the plaintiff's advantage. Thirdly it was for product quality control. The defendant said that it would be easier to control if the raw material came from one supplier. Different sources of raw material would entail adjustment of the machinery when manufacturing the product.

Having heard the evidence on this issue and having considered the explanation by the defendant which was not seriously challenged by the plaintiff and considering that the defendant knows the trade, I cannot say that his explanation is unreasonable. At that point in time the defendant did whatever that could possibly be done to keep the factory supplied with raw material. The fact that even the Board of Directors agreed for the purchases to be made through Harrison indicated the gravity of the financial situation of the plaintiff at that time. Hence the idea of getting the best prices especially when the raw material had to be imported from Singapore which required payments to be immediately (as per the evidence of PW3) could not be fully attained by the plaintiff at that time. In fact PW5 did not say that at the material time the plaintiff had the financial capacity or had sufficient credit facilities to make direct purchases for all the raw material needed by the plaintiff.

Further the Board of Directors of the plaintiff had regular monthly meetings. There was no indication whether this issue was ever raised. It is not that the Board did not know about the existence of the AP quota. But probably it was agreed at the material time that local purchases should be preferred to that of imported resins for the reasons given by the defendant in his evidence. For the plaintiff now to turn around and say that the defendant should have exhausted the AP quota would be quite unfair to the defendant. No doubt the purchases were done by the defendant but it was not as though the Board was kept in the dark of the suppliers or the mode of purchases. Indeed PW5 did not flinch to say that when the purchases were made through PSK Development no loss was suffered by the plaintiff although the purchases were also either through Ancom or Harrison with the marked up prices added and paid to the defendant. The reason for not complaining was probably due to the margin earned by the company which was owned by his parents. Indeed to PW5 it was not a case of 'what is sauce for the goose is sauce for the gander'.

I am not therefore satisfied that the plaintiff had established on the balance of probabilities that the defendant failed to secure the best available prices and failed to fully utilise AP quoto in the purchases of pp resins for the plaintiff.

Accordingly I also disallow this part of the claim by the plaintiff.

Next, the plaintiff claims that it suffered losses due to the non-availability of AP quota from 9 April 1996 to 20 November 1996. The blame was squarely put on the defendant for failing to apply. And it was the submission of learned counsel for the plaintiff that if there was AP quota available for that period a saving of RM114,300 would have been made based on the prices differences of Intraco and that of Titan. Accordingly the quantum of damages claimed was fixed at the alleged figure.

With respect, I do not find this claim under any of the reliefs prayed for in the amended statement of claim. As such I do not have to address it. At any rate I am not satisfied that the plaintiff has proved its claim on the balance of probabilities. The explanation given by the defendant for not fully utilising the AP quota would have made further application meaningless. As I have stated earlier on it was not shown that the plaintiff at that time had sufficient credit facilities to make direct purchases for the raw material. Hence I disallow this claim.

*(c) The Return Of Izuzu Trooper And One Unit Of Computer*

The plaintiff also sought for the return of the Izuzu Trooper and one unit of computer which were kept the defendant even after he was removed as a director and so-called managing director of the plaintiff.

The defendant is not denying keeping these items. Under cross-examination he said this:

> Q: You have refused to return the computer despite the request made by the company.
>
> A: No I did not refuse I have asked the lawyer if they wanted the vehicle and the computer they only need to give me a letter stating that I am dismissed as director and they can't do it until now.

In view of the stand taken by the defendant on the two items the inevitable consequence is that I should make the order for him to return them to the plaintiff. I do not think his reason for not giving back the items is justified. It is on record that he was not re-eleeted as a director of the plaintiff during its Annual General meeting on 8 October 1996. And the defendent knew well that as of 31 July 1996 he was no longer in charge of the administration of the plaintiff. There was therefore no reason for him to keep those items.

Accordingly I allow this claim by the plantiff in that the defendant is to return these two items to the plaintiff failing which he is to pay for their equivalent values as at 31 July 1996 to be assessed by the senior assistant registrar of the High Court at Tawau. There shall also be interest on the sum assessed.

*(d) The Return Of Shares And The Taking Of Files Of The Plaintiff*

These claims were some of the reliefs sought for by the plaintiff. However learned counsel for the plaintiff did not pursue it in his submission.

Anyway, in respect of the claim for the return of the shares allotted to the defendant, it was not in dispute that those shares were given to him as fully paid up. PW5 received similar privilege. It is quite obvious that they were given on the basis that they mooted the idea of setting up the business. And for the defendant he had knowledge of the business having worked in the same line previously. Accordingly I am of the view that those shares belonged to the defendant. There was no other reason advanced by the plaintiff other than saying that the shares were given for free earier on. However the gift was not conditional. The plaintiff also failed to point out any provision in the memorandum and articles of the plaintiff which entitled it to ask for the return of the shares in the event of any breach of duties by the defendant. I am not therefore satisfied that the plaintiff has proved on the balance of probabilities that it is entitled the return of those shares allotted to the defendant.

It was also alleged that the defendant took away files belonging to the plaintiff. This allegation was premised on the assertion by PW5 that one filing cabinet was missing in the office. The defendant in his evidence denied taking any file and said that the cabinet was his.

No submission was made by learned counsel for the plaintiff on this point and rightly so since there was no evidence adduced on any missing file. In fact there was no challenge to the assertion by the defendant that the filing cabinet belonged to him. Hence I refuse this claim as I am not satisfied that the plaintiff has proved this claim on the balance of probabilities.

*(e) The New Business Of The Defendant And The Resignation Of Some Staff Of The Plaintiff*

It was also alleged in the amended statement of claim that the defendant had obtained information, knowledge and skill while working for the plaintiff in breach of his duties. It was also asserted that the defendant used such information, knowledge and skill to start a rival business to the detriment of the plaintiff.

It is not in dispute that the defendant since leaving the plaintiff has commenced his own business producing the same product as that of the plaintiff. But it was not shown that the defendant learned all the skill and know-how in the business while working for the plaintiff. In fact it was to the contrary. PW5 said that the defendant knew the business since he was in the same line before teaming up with him to set up the plaintiff.

In any event it was not shown that there was any kind of agreement restraining the defendant from setting up rival business upon leaving the plaintiff. And even if there was s. 28 of the Contracts Act 1950 would have made such agreement void. Indeed there is no fiduciary duty against legitimate competition between directors (including employees) with a company upon resignation. (See: *Balston Ltd v. Headline Filters Ltd* [1990] FSR 385).

Thus I am not satisfied that the plaintiff has established on the balance of probabilities this aspect of its claim.

The plaintiff also blamed the defendant for the resignation of some of its key factory personnel who then proceeded to work for the defendant. Unfortunately for the plaintiff such allegation could not be sustained. DW2 (Kwan Kien Who) who was the factory supervisor of the plaintiff from November 1992 to July 1997 testified that he resigned from the plaintiff because he felt that he could no longer able to work for the plaintiff. And although in reply under cross-examination this witness said that even before Amble Brilliance started business he had already agreed to work with the defendant, he nevertheless maintained that he left the plaintiff on his own free will.

There was also no submission made on this claim by learned counsel for the plaintiff. Anyway no evidence was adduced naming the key personnel who left the plaintiff as a result of inducement by the defendant. And those called by the defendant clearly said that they left on their own accord.

Nothing turns on this aspect of the claim by the plaintiff. Thus, I am not satisfied that the plaintiff has proved this claim on the balance of probabilities. Hence I disallow it.

**Conclusion**

For the foregoing reasons I allow the claim by the plaintiff against the defendant but only in respect of some of the reliefs asked for, namely:

1. I hereby order for the defendant:

   a. to account to the plaintiff the sum of RMRM428,530 being the sum received as commissions in relation to the purchase of pp resins while as a director and so-called managing director of the plaintiff; and

   b. to return to the plaintiff the Izuzu Trooper vehicle and the computer failing which to pay the plaintiff their equivalent values as at 31 July 1996 as may be assessed by the senior assistant registrar of the High Court at Tawau.

2. In the exercise of my discretion under s. 11 of the Civil Law Act 1956 I hereby award interest for the following:

   a. Interest at the rate of 4% per annum on the sum of RM428,530 from the date of filing of this action, 22 February 1999, to the date of judgment;

   b. Interest at the rate of 4% on the sum assessed as the equivalent values for the Izuzu Trooper and the computer from 31 July 1996 to the date of judgment;

   c. Statutory interest at the rate of 8% on the sum of RM428,530 from the date of judgment to the date of full settlement; and

   d. Statutory interest at the rate of 8% on the sum assessed as the equivalent values for the Izuzu Trooper and the computer from the date of judgment to the date of full settlement.

3. I disallow all the other reliefs asked for by the plaintiff.

4. Costs to be taxed and to be paid by the defendant to the plaintiff.